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ABSTRACT

The landmark judicial decision "Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania" exemplifies a growing tendency toward the legal redefinition of educational issues previously committed to professional or bureaucratic solutions. During the decade since the "PARC" decision went into effect, the hearings and appeals process it mandated has come to emphasize procedural concerns at the expense of substance. The decision ushered in a dramatic increase both in the number of children receiving special education services and in financial support for such services. Its due process hearings, however, have proved more useful for settling individual grievances than for bringing about institutional/systemic reform. A comparison of model appeals cases reveals that, although the quality of decisions has improved, confusion still remains concerning what constitutes "appropriate" instruction and placement. Federal judicial second-guessing since the 1975 "Fialkowski v. Shapp" case has complicated matters legally by challenging the "PARC" system's autonomy. Although the "PARC" case had the positive function of placing special education on the political agenda and shocking the educational system into responsiveness, its decade-long history argues for an awareness of the dangers of legalism and the extent to which a fixation on process can trivialize substantive rights. (JBM)

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WHAT DOES DUE PROCESS DO? PARC v. COMMONWEALTH OF PENNSYLVANIA RECONSIDERED

David L. Kirp
and
Donald N. Jensen

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David L. Kirp is a Professor, School of Public Policy, and Lecturer, School of Law, University of California (Berkeley); Coordinator, Law Program, Institute for Research on Educational Finance and Governance, Stanford University.

Donald N. Jensen is a Research Associate, Institute for Research on Educational Finance and Governance, Stanford University.

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Abstract

The consent decree in PARC v. Commonwealth of Pennsylvania, signed in 1972, sought to transform education for the handicapped in that state. Its provisions were largely incorporated into the federal Education for All Handicapped Children Act in 1976. The PARC decree attempted to introduce legal values, predictability in evaluation and placement decisions, the right to appeal, and the like, into a policy environment hitherto dominated by professional and bureaucratic concerns. This article assesses PARC's success after a decade in operation. It finds that legalization of special education in Pennsylvania has been less successful than its proponents had originally hoped but that its consequences have still been significant.

I. Introduction: The Aspiration of Legalization

During the past two decades, a great many issues previously committed to professional or bureaucratic solution have been redefined as legal questions. A familiar policy pattern is detectable: a declaration of substantive rights is given specificity by reliance on law-like procedures which offer reasoned explanations for particular decisions. The growth of legalization is partly attributable to the teachings of the courts, which have transplanted concepts developed in the criminal law context to a host of other settings; this case study focuses on one such judicial decision, Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania.[1] But the impact of legalization extends far beyond the domain of the judges, influencing legislative policymaking as well.

Legalization is a controversial policy approach. Its supporters view legal rights as a trump card, a way of circumventing messy political bargaining.[2] They treat the due process hearing as a means

of empowering the individual, the bearer of rights, thus giving new force to classical liberal concerns. They also see the decisions that emerge from the clash of interests at play in the hearing as reliable, for the hearing is regarded as "the legal analog to the scientific method."[3] Opponents stress the pathologies of legalization. The concern for fair processes may degenerate into legalism, with the techniques of means dominating important substantive ends. Rights can distort the allocation of resources, giving unfair and politically expedient advantage to the holders of legal trumps.[4] And legal reasoning may merely camouflage decisions premised on other and altogether less attractive grounds.

To frame a policy issue primarily in legal terms betokens a choice, for every question may be cast in a variety of ways: either as one to be settled in the political arena, or as a matter left to professional expertise, or as a concern to be subjected to the norms of bureaucracy. The choice is not fixed in either-or terms--a legal system relies on professional judgment, for instance, and a bureaucratic regime borrows legal forms--but rather in terms of which mode of policy resolution is dominant. The pattern of dominance changes over time, but whichever approach is momentarily in the ascendency, the alternatives coexist uneasily with one another. Professionals view legal decisions as inattentive to concerns that cannot readily be given rational public voice; lawyers regard professional conclusions as inconsistent, offering no sure guidance in future circumstances; bureaucrats see legal rules as impeding their ability to carry out broad policy mandates. This

four-wheeled cart of policy--legalization, professionalization, bureaucratization, and politicization--is inherently subject to wobble and strain.[5]

Such tension is readily detectable in the domain of special education. Advocates for handicapped children have joined a substantive legal entitlement, to an "appropriate" education, with procedures designed to specify the meaning of that entitlement. A predominantly legalized model, imposed by court decision, replaced a system in which rights had been previously unknown. Professionals had enjoyed enormous discretion in deciding whether children were educable at all, and so had a legal claim to publicly-subsidized instruction, and, if educable, what form of instruction best fit students' needs. Professionals made their determinations within the context of a bureaucracy attentive to the conflicting concerns of many claimants, in a political universe that gave short shrift to the demands of the handicapped.

Distrust of this system, which had excluded substantial numbers of hard-to-educate youngsters and consigned many of the rest to segregated institutions, led advocates to push for a decision-making apparatus premised on rights which afforded procedural protections. That tactic proved persuasive to courts in several states and, ultimately, to Congress. What was later written about the Education for all Handicapped Children Act is also true of PARC:

> Essentially, the Act attempts to improve the education of handicapped children by creating two quite distinct "rights," which can be usefully classified as substantive and procedural. The

> substantive right is the right to an "appropriate" education--a term not otherwise defined, except that the Act creates a presumption against the appropriateness of separate classes or facilities for handicapped children. The procedural right is, in fact, a bundle of rights which is intended to ensure that the decision-making process is fair, and involves continuous participation by the parents or others acting on behalf of the child. The bundle includes, among other things, the right to a formal due-process hearing, the right of appeal to state authority, and a further right of appeal to either state or federal courts. Both types of rights are unique, in the sense that they have not been accorded by federal law to any other category of student.[6]

Yet the triumph of legal forms and norms was not, and indeed could not, be unalloyed. For one thing, the requirement of an appropriate education necessarily entails a professional diagnosis and recommendation of a remedial plan. For another thing, this new educational order had somehow to mesh with the existing educational bureaucracy. Legalization thus became the dominant but not the exclusive frame for decisions concerning the education of handicapped youngsters.

In special education as elsewhere, the debate over whether legalization is curse or godsend has been largely free from fact, the antagonists preferring principles or polemics to data. By now, however, the landmark effort at legalizing the education of the handicapped, PARC v. Commonwealth of Pennsylvania, has been in place for a decade, and that is long enough to appraise what may be understood as a great social experiment. During that period, the educational system has ironed out the inevitable initial difficulties, adjusting in order to

assimilate the demands of law. The due process system, as it functions in Pennsylvania, has matured and stabilized.

The court in PARC did not confine its efforts to a declaration of rights, leaving the task of implementation in the hands of school officials, since doing so would have risked evisceration of the entitlement. Nor did the court carve out for itself a continuing monitoring role as manager of the implementation process.[7] Instead, PARC converts a substantive right--the right to an appropriate education--into a procedural entitlement. Parents who disagree with the diagnosis and placement decisions made by a school district may request a due process hearing to challenge such decisions. Whichever party loses at the hearing stage may appeal to the state education department, and ultimately to the courts.

This new system promised fairness to individual claimants, but the ambitions of the PARC advocates were more venturesome still: PARC hearings would bring about institutional reform, not just individual justice. As Thomas Gilhool, one of the attorneys for the plaintiffs in the suit, declared:

> For the first time in American education, a mechanism is created to assure that the educational program fits the child. The mere fact of a hearing opportunity...will of course keep all the field professionals on their toes. There is a new instrument of accountability. The right to a hearing creates an extraordinary forum for parents and their associations to express themselves, and to organize. And it should transform education.[8]

What makes the use of a due process system especially noteworthy in special education is the openendedness of the underlying substantive standard. Where an entitlement is protected by procedural safeguards, the dispute to be resolved usually entails matching fact situation with legal rule: "Is a welfare recipient entitled to additional funds to permit her to obtain a winter coat?"; "Are the injuries suffered by a workman of sufficient magnitude to entitle him to full disability payments?" The application of procedural safeguards to education in the context of student discipline similarly calls for the resolution of a close-ended question: "Did a particular student assault a teacher?" In special education, however, the task is more complex, the process more problematic. Determining what is an "appropriate" educational regime sometimes assumes a greater level of professional knowledge than actually exists; and what is appropriate may also vary with what the schools can afford to do.[9] Yet, from the system of decision that PARC creates, the meaning of PARC's substantive guarantees was supposed to emerge with greater specificity and clarity.

The elements of the PARC entitlement all speak to this expectation. The due process system contemplates an administrative hearing with an impartial hearing officer, a requirement that the decision be based exclusively on evidence introduced into the record, and a legal form designed to promote reliability in particular judgments. Appeals from hearing decisions were designed to serve two distinct purposes: to impose procedural regularity in the conduct of

the hearings and to promote uniformity of outcome in factually similar cases through adherence to precedent.

In setting the decision-making apparatus in motion, various deliberate deviations from legal formalism--most significantly, the determination that only professional experts and not lawyers would act as hearing officers--signalled that the best of two traditions, professional and legal, was to be preserved. Professionalism would promote adequate diagnosis and suitable educational placements, matters to which only experts could speak with confidence. But the sorry history of special education indicated that professionalism, by itself, offered inadequate protection to the handicapped. Legally-rooted concerns for reliability would insure diagnostic and placement consistency, while tempering professional interest (and self-interest). At the state level, lawyers would decide appeals by testing the record against developed standards of decision, in effect, inventing a precedent-based legal system. These two traditions coexisted in the hearing process: hearing officers were required to apply their expertise, even as they adhered to law-like procedural rules.

PARC's legalized regime thus contained within it the possibility that each tradition would attempt to subvert the other: the legal by recreating the trial ethos in hearings and appeals, the professional by insisting upon the habitual prerogatives of the expert at the expense of constitutionally predicated concerns. In any event, legal norms have proved dominant--too much so, from the vantage of the child. To anticipate our conclusions, both the hearings and the appeals mandated

by PARC emphasize procedural concerns at the expense of substance. Those hearings which are held usually concern familiar, even routine, matters. More novel issues or disputes which would necessitate systematic change are not resolved in the due process system, but instead are brought to the courts. The hearing and appeal mechanism has thus been unable to treat the PARC mandate in dynamic terms. Routinization of disputes has come to mean that a law-like system has become--all too fully--part of the workings of the educational bureaucracy.

The teachings of PARC are mixed. The availability of legal recourse initially shocked public schools into recognizing the claims of the handicapped, and this apparatus now serves the modest but nonetheless significant end of settling routine grievances that arise between parents and educators. Yet due process, nestled within the structure of the ongoing educational system, has not brought about the revolution that its initial supporters imagined, for the regime of hearing and appeals is conservative in operation.

This appraisal, elaborated in the balance of the article, has relevance not only to Pennsylvania but also to the nation as a whole, for the hearing and appeal mechanism first established in the PARC decree was largely incorporated into federal legislation. Our evaluation suggests a role for law that is at once more significant than its antagonists would favor, more limited than its enthusiasts contemplate.

II The Impact of PARC: Who Gets What?

The PARC decision, coupled with the Education of All Handicapped Children Act,[10] worked major changes in the lives of Pennsylvania's handicapped students. More children were identified as handicapped and more dollars were spent on them than had ever been the case.

In 1970-71, the year before PARC went into effect, 160,984 children were provided special education services in Pennsylvania's public schools, or in private schools at commonwealth expense; by 1979-80, the last year for which complete data are available, that number had risen 50 percent (see Table 1). This increase is even more impressive when viewed in light of declining school enrollments: the proportion of students receiving special help jumped from 6.7 percent to 11.3 percent between 1970-71 and 1979-80.

Increases in financial support have proceeded apace. During the year before PARC, $64 million was expended on special education in public and state supported private schools; by 1979-80 expenditures had almost quadrupled, to $236 million (see Table 2). During this period, special education fared much better in Pennsylvania than spending on education generally, which increased by 193 percent, or the Consumer Price Index, which rose by 203 percent during those years. In absolute dollar terms, there was a substantial influx of new money into educational programs for the handicapped.

These changes are primarily traceable to PARC, not to the federal legislation: within three years after the effectuation of PARC and

before the passage of the federal law, expenditures for special education had already risen 237 percent and special education enrollments had mushroomed 29 percent.

At both the state and local levels, the education bureaucracy changed to accommodate the new presence of handicapped children. A Right to Education Office, founded in the aftermath of PARC, has become a permanent part of the commonwealth's education machinery. That office monitors PARC implementation, provides technical support to local officials, and administers the PARC hearing system.

The legal division of the state education department has made special education a central responsibility. The division trains the hearing officers mandated by PARC, assigns them to disputes on the basis of their expertise, and monitors their performance. State inspectors, assigned to each of ten regions within Pennsylvania, oversee school district behavior to determine whether the decisions of the hearing officers are being given life and meaning in the schoolhouses; their mandate reaches also to districts which have experienced few hearings, assuring that handicapped children in such places--most typically, small and rural districts--also receive special attention. In local districts, the special education office, previously of marginal importance to the school organization, has acquired new authority. "Public attention also has brought to special education a prestige formerly lacking," said one special education officer in Pennsylvania, and this too has led school officials to take seriously the concerns of parents of handicapped students.[11] Task forces in many districts have

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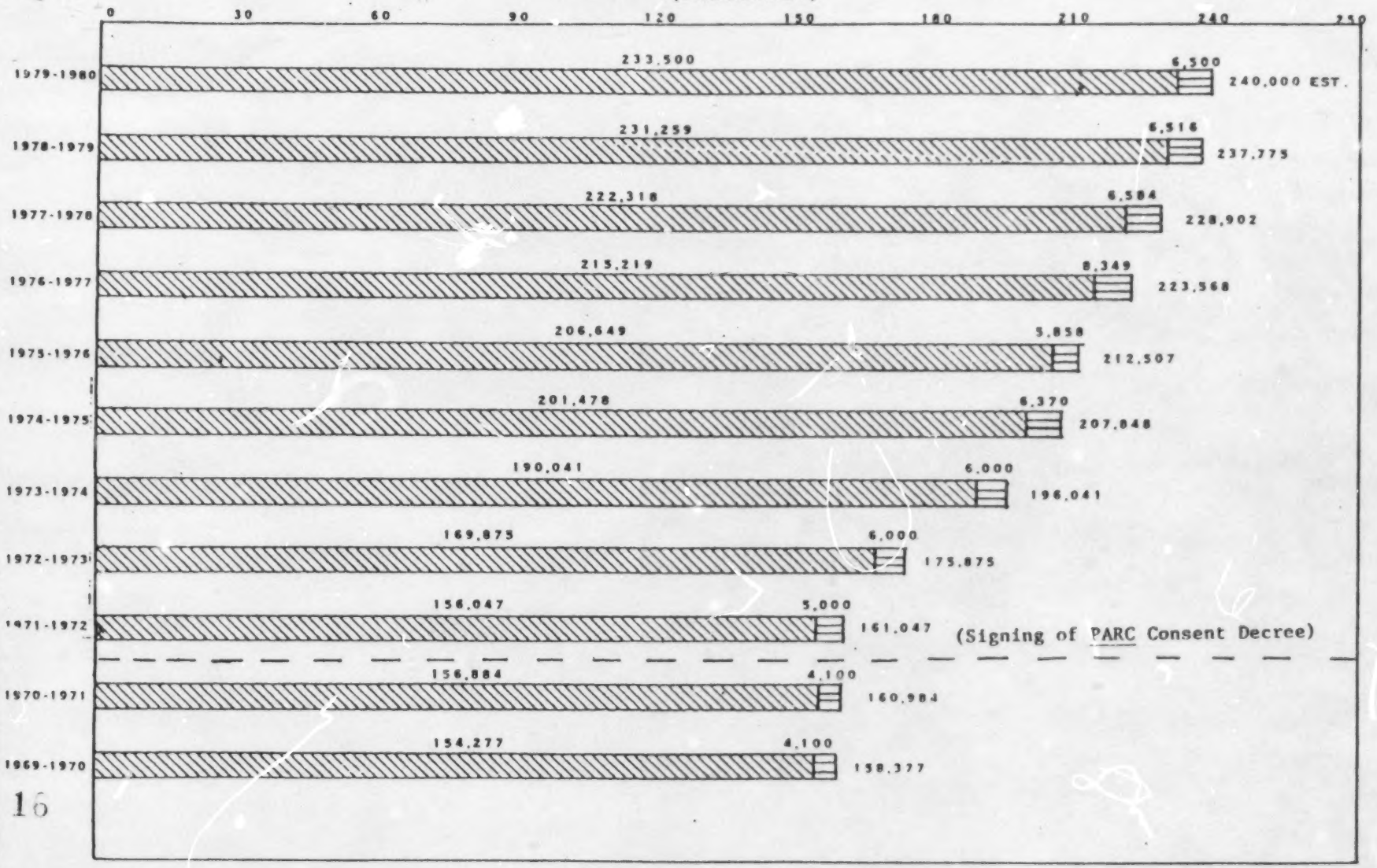
Table: 1 SPECIAL EDUCATION ENROLLMENTS IN PUBLIC AND STATE APPROVED PRIVATE SCHOOLS HAVE MUSHROOMED SINCE THE PARC SETTLEMENT



Source: Department of Education, Commonwealth of Education

16

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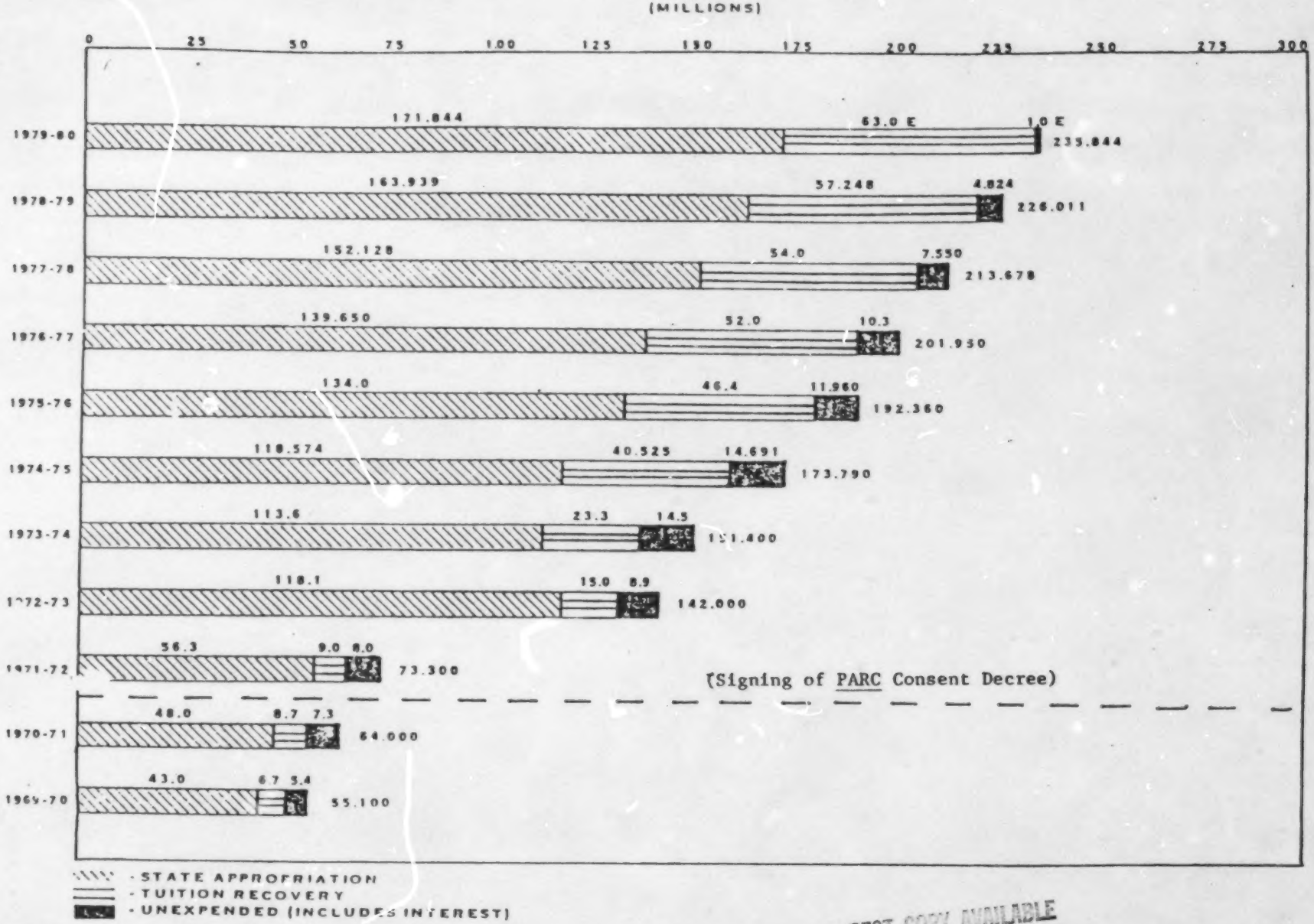
Table 2: SPECIAL EDUCATION FUNDING IN PENNSYLVANIA'S PUBLIC SCHOOLS GREW MARKEDLY SINCE THE PARC SETTLEMENT



Source: Department of Education, Commonwealth of Education

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brought together school administrators, special education professionals, citizens' groups, and private agencies concerned about the handicapped to monitor instructional programs.

III. Due Process Hearings

The system as a whole has evolved markedly, and familiar management techniques--establishing new bureaus, creating monitoring devices, involving community groups--have had much to do with that evolution. But what of the centerpiece of the PARC enforcement apparatus, the due process hearings and appeals? This legalized apparatus was supposed to give meaning to the idea of an "appropriate" education for handicapped children, but the reality has been more modest. The hearings have been relatively few in number--only 618 were held between the inception of the mechanism in 1972 and 1981--and restricted in scope. The issues they deal with are individual, not systemic, in nature, and are largely resolved by formula. Demands which would require substantial expenditures or structural changes in the system--requests for wholly new programs, for instance, or claims on behalf of new enterprises of handicap--have been successfully resisted. Consequently, the changes by the hearings have been limited in character and marginal in their impact.

The very idea of due process, when introduced in the context of a right to an "appropriate" education, was unsettling to school officials,

who viewed the apparatus of the law as an unwelcome intrusion. Over the past decade, hearings have become more commonplace if not necessarily more welcome, events (see Table 3).

Moreover, the paucity of educational opportunities for the handicapped a decade ago, at the onset of the PARC regime, made disputes predictable; one might anticipate greater consensus between school districts on the one side, parents and advocacy groups on the other, as resources gradually expanded. For these reasons, it makes sense to view the hearings over the course of time, distinguishing the early from the more recent experience.

Disputes during the first years centered on how children were labelled by the education system and how they were treated. Parents of mildly handicapped children frequently resisted the label retardate and sought placement in regular classrooms, the ordinary instruction supplemented with itinerant help; school systems preferred classifying such students as retarded, placing them in already-existing settings. Concerning the seriously handicapped, controversy focused not on the label attached to a child--with these youngsters, the fact of handicap was not in doubt--but on what services were provided. Parents often preferred private placements, expressing concern that the particular needs of their children would go unmet within the public schools. The schools countered by proposing assignment to a publicly-run program, whether for trainable retardates or for the profoundly retarded.

In 64 out of 168 hearings held between 1972 and 1975, parents resisted a school proposal to classify their child as retarded or to

further remove the child from the mainstream of the school. School districts were four times more likely than parents to classify a child as educable mentally retarded; parents preferred less stigmatizing labels, such as learning disabled, brain injured, or socially and emotionally disturbed. Parents sought private placements for their child at state expense in 20 of 168 hearings; the state sought such a placement in only one hearing.

Concerning both labelling and placement disputes, the schools' position was motivated primarily by organizational needs. Easily administered standardized IQ tests, not a personal assessment drawing on a variety of sources, became the school districts' chief basis for classification; assignments were made to extant programs, not newly-invented ones. In just 8 percent of the hearings did districts attempt to tailor educational prescriptions to the needs of the particular student. "[M]ost districts did what they had to in order to satisfy the formal mandate. Relatively few went further to produce that individualized remedy...to which the PARC 'appropriateness' standard aspired."[12] Parents saw their children's problems in very different terms. They focused on particular grievances, noting the specifics of the instructional regime which they found unsatisfying, relying on observations of their children's behavior rather than IQ tests to form their assessments of need and ability.

School districts accommodated themselves with considerable dispatch to the demands of a legalized proceeding. Though some of the early hearings were marked by disputes over technical legal points--adequacy

of notice and the like--these decreased markedly in later years. The growing tendency of school districts to rely on legal counsel--in 67 percent of the hearings, during the first three year of the PARC regime, 79 percent of districts in 1979-80--explains the success of this adaptation. School districts were consequently well equipped to marshall evidence, deploy appropriate witnesses, and the like. Parents, by contrast, relied on professionals outside the system, such as social workers, and depended on laypersons--friends, neighbors and the like--who could not respond to the school's contentions in the form they were expressed. Parents "failed to understand the criteria schools use to make educational decisions."[13]

The schools' criteria proved decisive in the hearings. For a district to win, "[i]t was enough to demonstrate that [school personnel] had followed the necessary evaluation and prescriptions procedures, and that in classification and programming they had attempted to provide the most normal setting possible."[14] Individualized program design was not a requisite for school success; adherence to the norms of the organization was. "Appropriate" came to be equated with what was bureaucratically achievable. As schools became capable of matching their decisions with preexisting standards, they prevailed regularly: during the four years after PARC, the school district was vindicated in 62 percent of all hearings.

One might imagine that in more recent hearings, once school districts had acclimated themselves to the demands of professional and legal values, greater flexibility would be evident, but this has not

Table 3

Pennsylvania Special Education Due Process Hearings Have Been Relatively Few in Number Since Their 1972 Inception

1972	36
1973	61
1974	44
1975	49
1976	60
1977	90
1978	80
1979	48
1980	66
1981	84

occurred. Instead, the mature system betrays an even keener fixation with legal and bureaucratic norms, less of a commitment to professional interests. Parents were slightly more inclined to rely upon lawyers in 1980, half of all parents were represented by counsel, as compared with 42 percent during the first three years of hearings. What was centrally at issue had not much changed: disputes over the labelling of the handicapped and demands that the severely handicapped be provided private instruction at public expense remain the two most common issues. And school districts have become even more successful advocates: parents won just 11 percent of all hearings in 1980, a mere 4 percent in 1981.

The due process hearings have had limited impact on the working of schools. They are treated as highly individualized disputes, with the conclusions reached in one hearing having little apparent bearing on reasoning in another. In one early case, the parents' lawyer tried to introduce another hearing officer's decision into the record, arguing that it was sufficiently similar to the case at hand to be useful. The school district resisted, insisting that each case had "too many variables" to render comparison useful. That position prevailed, as the hearing officer refused to take the previously decided case into account. Such behavior, more highly reminiscent of individualized kadi justice than western law,[15] limited the impact of early decisions. More recently, a system of precedent has taken root, particularly at the appeals level. But the scope of impact has not much widened, for the due process hearings treat only the routine case that has modest

institutional implications. The hope that a particular dispute would serve as a learning experience with implications for the future, has not been realized.

This conclusion ignores the indirect impress of proceduralism at the school level, and this may be substantial. The time and financial costs of holding a hearing have prompted school districts to settle disagreements prior to the formalization of a dispute. Special educational professionals have assumed responsibility for resolving controversies before they erupt. Formal pre-hearing conferences were held in all commonwealth school districts until, as a result of a Department of Education determination that pre-hearings violated the due process requirements of children, federal pressure halted the practice in 1981. Nonetheless, the number of formal hearings rose to an average of 70 per year in the past four years, as compared with 48 per year during the first five years after PARC. Bargaining in "the shadow of the law"[16]--as well as the harder-to-discern changes in school officials' behavior, undertaken in order to minimize the possibility of dispute between parents and school districts--may well have had greater significance on the workings of schools than the hearings themselves.

IV. The Appeals Mechanism: Giving Substance to the PARC Mandate

Those dissatisfied with the outcome of the due process hearings have the right under PARC to appeal to the commonwealth's education department. That appeals apparatus was meant to serve two functions:

to elaborate substantive legal standards and to manage the procedure used at the hearings. While the number of appeals has stayed relatively constant since the mid-1970s--an average of 40 cases a year are appealed--the quality of appellate opinions has improved considerably over time. During the early 1970s, consistency among decisions was not to be had; more recently, something akin to a system of precedent has begun to evolve. Yet the precedents themselves further diminish the ambit of professional discretion. The message of the appeals decisions, as of the hearings, is that the commitment to "appropriate" instruction is an ideal tempered by accommodation to program availability and resource constraints.

During the first three years of the PARC regime, one-fifth of all hearing decisions were appealed. Almost all the appeals concerned the mentally retarded, reflecting the initial PARC focus on the needs of this group. Appeals centered on two issues: the implication of PARC's preference for assignment to classes as close to the mainstream as possible and the meaning of "appropriate" education.

The PARC consent decree specified that placement in a regular public school classroom was presumptively preferable to assignment in a special public school class, and placement in a special public school class was preferable to placement in a more segregated setting. The "presumption of normality," as it was termed, was the key substantive element in PARC. It linked principled opposition to separation with an educationally rooted belief that, however benignly motivated,

markedly distinguishing the handicapped from the regular school population was hurtful.

The first administrative appeals decisions effectively reject the presumption of normality. They do not do so directly, for that would be clearly impermissible, but they simply ignore it. In several opinions where the dispute between the parents and the school district concerned the level of handicap and the propriety of segregated treatment, the appellate decision did not take into account the PARC standard. Even where the presumption of normality was noted, it received little weight in the early cases; concrete conclusions about particular institutional programs triumph over presumptions.

In Bungo,[17] for instance, a child who had fared badly in regular kindergarten and first grade was tested and found to have the IQ of a trainable retardate (TMR), two classification levels below normal (the intermediate classification is educable retardate [EMR]). Reassignment to a TMR program was approved by the hearing officer, in a decision affirmed by the Secretary of Education. There were good reasons to oppose reassignment: the parents introduced evidence that medication which the child was taking may have depressed her test performance, a substantial test score improvement on retesting was demonstrated, and there was evidence of speech defect which may well have confounded the intelligence assessment. Yet the opinion does not discuss the impact of the PARC normality presumption on the propriety of assigning to a class for trainable retardates rather than a program for educable retardates or learning disabled. Indeed, the opinion seems

implicitly to embrace the protectionist view of special education, an ideological position directly counter to the integrationist model embraced in PARC. "While we wish that Ramona would be able to participate successfully in the program for the educable mentally retarded, we cannot permit such a placement before she is ready to handle it--a premature placement would hurt her development..." A more balanced reading of the record would suggest that the child, far from being clearly identifiable as a trainable retardate, had uncertain potential; in that context, the presumption should have, but did not, come into play.

The practical irrelevance of the presumption is even clearer in JM,[18] a dispute between parents, who sought to continue their child's placement in the regular class, and a district which proposed placement in the program for educable retardates. The hearing officer's opinion called for supplemental instruction focused on the child's special needs while keeping the child in the normal class, explicitly to avoid the stigma of isolated special treatment--the very value underlying the normality presumption. The Secretary of Education reversed this action, finding substantial evidence--namely, IQ test scores--that EMR placement was appropriate, and dismissing the stigma issue as an unwarranted parental concern. Even if the Secretary's reading of the IQ score evidence is right, it is not dispositive under PARC, since children can be aided both in the regular classroom and in isolated classrooms. Although the presumption of normality should count most in making this choice, here it counts not at all.

Subsequent opinions reverse field, and more consistently take the PARC normality presumption into account.[19] Where the profesional evaluation is ambiguous, these decisions rely on the PARC preference for mainstreaming. The later opinions also pay less heed to professional judgment: the appellate deciders have proven more inclined to go by the book, despite occasional inconsistencies.

The mandate that each handicapped child receive an "appropriate" education affords another opportunity to see whether the legal and professional traditions can complement one another. In theory, professional expertise would enable hearing officers to make accurate factual diagnoses and placement decisions; legal standards, applied in review, would insure that diagnoses of analogous fact situations resulted in comparable placements. But such a view presumes a greater degree of consensus and a higher level of professional knowledge than actually exists. The capacity to perform an accurate diagnosis--even to identify a child's needs--in a way to secure the consent of diverse professionals is limited. Harder still is the task of fashioning agreement concerning the ideal pedagogy and instructional setting. In this context, precedent might substitute for professional standards in defining appropriateness.

No such consistency is apparent. The opinions do not specify which elements of handicap are crucial to the identification and how those elements should be identified; consequently, there are divergent diagnoses of the handicap of a given child, each able to withstand

review. The legal standard could not resolve differences within and among the professions, and hence failed to secure consistency.

A comparison of two cases, each involving a dispute over the appropriate diagnosis (or classification) of a child's being learning disabled or retarded, suggests the dimensions of the problem. In S.S.,[20] a child whose IQ scores fell in the retarded range was found by the hearing examiner to be a multiply-handicapped, learning-disabled, brain-injured child with erratic development; the school district's assertion that evidence of retardation was sufficient to justify classification as retardate was rejected by the Secretary, the more complex diagnosis being preferred. In D.D.,[21] by contrast, evidence that a child whose IQ scores also were in the retardate range was in fact brain-injured was dismissed by the hearing examiner, who simply applied the state-wide IQ standards to establish retardation; this decision too was upheld upon appeal. The point is not that S.S. was rightly decided and consequently that D.D. is a bad decision, but that the two opinions are inconsistent in the approach they undertake to ascertain the student's handicap. The underlying question is not "Is there evidence that the child has an IQ in the retardate level?" but rather "Is this properly the end of the inquiry" Neither the relevance of the evidence concerning brain damage nor model of retardation adopted is specified in these opinions.

A comparison of two appeals, Michael,[22] and Dennis,[23] reveals the depths of confusion concerning the standard to be applied in determining appropriate placement. In Michael, exhibits introduced by

the parents concerning a range of disabilities from "language learning disabilities" to slight hearing impairments including emotional problems, were intended to bolster their contention that EMR placement was not appropriate to the hearing officer. In an opinion affirmed by the Secretary on appeal, none of these exceptionalities was "sufficiently extreme" to warrant a particularized program. In Dennis, a similarly multi-faceted presentation persuaded the hearing officer and the Secretary to order learning disability placement, overruling the district's preference for an EMR assignment.

The Dennis opinion also serves as the occasion for an attempted reconciliation of the apparently inconsistent placement cases, but that effort focuses on procedural matters and the degree of deference given to hearing officer's decisions, not on substantive guides. Dennis insists that the hearing officer justify a particular placement recommendation where there is evidence of two confounding handicapping conditions. But what does this justification entail? Without clarity on this vital matter, the meaning of appropriate identification remains nonjusticiable or at least not captured by a comprehensible standard.

The puzzling aspects of these decisions are not mere legal quibbles. They go to the heart of the task set for the appellate process, the drafting of opinions which offer coherent guidance to concerned parents, school officials, and hearing officers in future cases. With respect to these diagnostic and placement cases, that guidance is not provided, and that leads one to wonder whether these questions are susceptible to clear resolution in the forum of a due

process hearing. At the least, the opinions reveal the presence of disagreements within the helping professions, and serve as reminders that there are no monolithic professional--or, for that matter, bureaucratic or legal--world views, and that professional opinion is far from objective in its assessments.

A decade after PARC, professional controversy persists about the diagnosis of handicaps and the appropriate educational prescription. There is abundant evidence that placing children into some categories of exceptionality occurs for reasons other than an "objective assessment of a child's mental, emotional, and physical status. Poor and black children are disproportionately labelled as educable mentally retarded; white and middle class youngsters are treated as brain injured or learning disabled." This was confirmed by one study published by the Pennsylvania Office of Budget and Administration in 1977,[24] which found that increasing socio-economic status was associated with decreasing EMR placements; brain injured/learning disabled placements were increasing in the commonwealth, and studies in other states indicated that such increases also were associated with race and increasing socio-economic status. Parental opposition to the stigmatizing effects of EMR placements may play a significant role in the declining EMR enrollments, since parent wishes--especially the wishes of the middle class parents who are most likely to challenge school placements and who generally are most active in handicapped rights organizations--play a large part in classifying children into certain exceptionalities.

V. The Appeals Mechanism: Managing a Legal System

The appeals system also was supposed to permit the state to manage the law-like due proess system. The more coherent the substantive legal standards developed in the appellate opinions, for example, the more likely it was that these standards would be applied in the subsequent hearings. But the management function also involves other non-substantive tasks. In a new system, designed to draw on the best of both the legal and professional modes of inquiry, the virtues of the legal model--consistency, reliability of factual determinations, and the like--had to be secured. This entailed resolving questions about the admissiblity of evidence, the respective role of the parties and the hearing officer, and other similar matters. Though early decisions were marked by confusion, the system has mastered the elements of procedural regularity after a decade. It may have done so all too well, since this legalism has come at the expense of the particularity and flexibility that the professional norms were meant to contribute to the process of decision.

The very first appeal, John Doe,[25] served as the vehicle for describing the nature of the hearing procedures, especially the role of the parties and the authority of the hearing officer. But that opinion is unsatisfactory because it defines the procedural structure almost wholly in terms of burdens of pleading and proof, without specifying what those burdens mean.

The role of the hearing officer also is recast by early appeals. The hearing officer in John Doe had ordered a specific private school placement for a child whom the school district wished to assign in the Department of Public Welfare. This was invalid, the Secretary concluded: the hearing officer could only make a general recommendation concerning placement, while the actual placement choice lay with the school officials. That is a misguided approach, for there is often only one appropriate placement, and the hearing officer should be permitted to specify it and articulate its unique virtues. As a rule of procedure, this decision weakens the hearing officer's authority, giving him less judge-like power than PARC requires.

The appeals process presumably is authorized to interpret the general placement recommendations it sees fit, the parents' only recourse being to request yet another hearing. The hearing officer's authority also is narrowly defined in the appeal with respect to the educational regime that he may order. In so doing, the state limits the capacity of hearing officers to solve educational problems within the context of the PARC framework. The effect of Doe is to emphasize legalism at the expense of less conventional but by now familiar efforts on the part of deciders to link legal and policy-formulating functions. Ironically, these hearing officers--envisioned by PARC as less constrained than a law judge--are, because of Doe, less able to act flexibly than their judicial counterparts.[26]

The early opinions subordinate professional to legal concerns, and yield a consequent diminution in the scope of professional discretion.

Procedural issues, always a central concern of hearings and appeals, have become even more dominant in recent decisions. Some appeals challenge the factual determinations of hearing officers; many others focus on such points as the admissibility and substantiality of evidence presented at the hearings,[27] the timeliness of appeals,[28] the role of experts as witnesses,[29] and the allocation of the burden of proof.[30] Both early decisions and federal court decisions are relied upon as precedent, thus insuring an orderly law-like regime. The legal rules also have been codified into a coherent format in a hearing officer handbook, and this gives them added force.

But defining legal values also may demand an accommodation between legal rights and the organizational concerns of districts. Consider the early cases, dealing with children who show evidence of both retardation and some other abnormality. A child who can be labelled retardate is appropriately assigned to a class for retardates, while the multiply-handicapped child demands a more tailored placement. All school districts operated programs for the retarded but only some managed classes for the learning disabled, and almost none had a program offering simultaneous treatment for both kinds of handicaps. It made good bureaucratic sense for the school district to urge that the child in question be labelled retardate and that assignment to a program for retardates be deemed appropriate. On the other hand, parents resist the label "retardate," prefering a more individually designed program for their child. Thus, questions concerning appropriate placement, nominally professional in nature, actually turn on the capacity of the

system to address divergent needs and on ideological determinations; these questions in turn lead to disputes about the relationship between resource availability, the adoptive capacity of public organizations, and appropriateness. Does "appropriate" mean best--or best in light of what a school district presently offers?

When these issues arose in the appeals, the Commonwealth often gave some consideration to the school district's ability to offer the needed program. If the school district did not provide such a program, the child was sometimes placed in a reasonably appropriate program, not the most appropriate. This adjusting of competing values has been an important characteristic of the PARC system throughout its existence.

This balance is sometimes acknowledged in the appeals themselves. The relationship between resource vailability and program appropriateness, for example, is confronted directly in Michael Weinberg,[31], involving a child with multiple handicaps. As the opinion concedes, an ideal program for the child would address both retardation and brain injury. "However, when such specialized programs are not available or are economically impracticable (sic), the hearing officer must determine which existing education program would benefit the child most." This is a standard that appears to limit hearing officers to a choice among already provided alternatives, not permitting them to order the creation of a wholly new program.

In Christine L.[32], the Secretary of Education confronted the tension between rights and resource availability in a discussion of the meaning of "appropriateness and adequacy." A school district, he

asserted, need not provide a child with the best education available; it only need instruct a student in those areas in which he is deficient through a program that meets some clear educational minima.

Resource limitations more frequently are an implicit consideration of those educational officials who actually decide appeals. In an interview plumbing the bases for decision, the lawyer for the state education department responsible for preparing the PARC opinions said that he would not accept excessive cost as an excuse for a district's failure to provide a program, but would treat cost as a consideration in assessing how much had to be required. Rights, he said, are tempered by reason.[33] Despite the stress on educational rights in the PARC consent decree, due process hearings and appeals decisions have consistently taken cost and bureaucratic considerations into account, balancing rights against resources in a way less frequently seen in legal opionions.[34] This may well be sensible policy, but it is not what the PARC advocates anticipated.

The PARC consent decree required much from the educational bureaucracy in the way of system management. Not only were new bureaus, organizations, and other units to be established to administer the terms of the decree, but the state was also supposed to incorporate legalist norms into the existing bureaucratic culture. This incorporation has taken place, but not without some difficulty.

Pennsylvania's department of education was ill-equipped to manage this appellate system in the years after PARC. As former Secretary of Education John C. Pittenger observed:

> Those hearing appeals were generally written by an assistant attorney-general and signed by me or my executive deputy...at least five different assistant attorneys-general were working on that problem in the years that I was Secretary...Not only was there a terrible turnover at that level, but there were equally rapid and sometimes unforseen turnovers at every level of that department, including three attorneys-general in five years. The result was a total lack of planning and coherence up and down the line.
>
> In addition, we were constantly under the gun. PARC and others were complaining that we were not hearing the appeals quickly enough. That put a premium on getting the cases out in a hurry--not on developing a consistent body of law. In fact, within the last year (1977) the department has fallen so far behind that I think they have had to farm out appeals to practicing attorneys in Harrisburg! That is a deplorable practice, but given the state of the budget and the impossibility of hiring additional staff, it seems to be the only solution.[35]

Since 1977 much has changed. A single lawyer in the Department of Education has been assigned continuing responsibility for drafting appellate decisions, and thus has made the process more orderly--and more legalist in orientation. That lawyer places less weight on the hearing officers' decisions, viewing them as recommendations to be modified when he discerns good reasons, in fact or law, to do so. The stabilization in the state legal office has enabled officials to shape a legal system in other ways. That office now casts appellate opinions in a more strictly "legal" format, drafting those opinions in the expectation that they will afford guidance in similar disputes, serving as precedent in subsequent appeals.

Legal and bureaucratic values dominate the mature PARC due process system. Legalism is apparent both in the appeals, which frequently concern procedural issues and focus on the element of a dispute that can be accommodated to a precedent-based system, and in the hearings, which resemble adversary proceedings. School district concerns for efficiency are reflected in and focus on these elements of a dispute that can be accommodated by a precedent-based system. The result is a system of decision in which professional expertise has only residual importance.

The PARC hearing and appeal apparatus has not evolved into an autonomous constitutional system--that is, a system that can adapt to the range of all disputes that arise from the treatment of the handicapped. The prevailing balance of legal, bureaucratic and professional norms results in an increasingly routinized justice. Most hearings and appeals speak to similar matters; because the issues are marginal, the decisions can be implemented without organizational disruption. The hearings also deal only with individual grievances. There has been no equivalent of the class action suit within the PARC machinery.

When novel issues are posed or substantial change in the educational system is sought, the apparatus is nonresponsive. Parents have consequently taken these grievances elsewhere--usually back to the federal courts which ordered the creation of the PARC regime. Significantly, this has occurred with increasing frequency during the

past few years, as the PARC system has grown more calcified, and has diminished the importance of the PARC administrative review mechanism.

VI. Judicialization Redux

The PARC decree left the meaning of an "appropriate" education to be determined on a case-by-case basis, by the procedural apparatus that PARC itself brought into being. Such autonomy, comparable to that traditionally accorded to administrative agencies under the Administrative Procedure Act, was presumably intended to permit the new system to mature and to develop expertise over time.

A modest degree of coherence, particularly concerning the process of decision, has been achieved. But subsequent decisions of the federal courts have undermined the independence of the PARC system, subjecting the PARC regime to continuing external review. One of these cases, Fialkowski v. Shapp,[36] speaks directly to the autonomy of the PARC due process system. Other cases, also attentive to the reviewability of PARC administrative judgments, focus on the categories of handicap that PARC reaches or the quality of services that handicapped children receive under PARC. The due process hearing and appeals procedure is no longer a self-contained enterprise but instead routinely subject to federal judicial second-guessing.

The case that frontally addresses the autonomy of the PARC system, Fialkowski v. Shapp, was brought on behalf of multiply-handicapped children. Money damages as well as a new

pedagogical regime were sought from school officials who allegedly had provided these children only babysitting, not "appropriate" training. The Fialkowskis had disputed the placement offered by the school district at an administrative hearing. They did not appeal the hearing decision as PARC contemplates, but instead proceeded directly to federal court. While it is legal commonplace that would-be litigants must first exhaust their administrative remedies, the Fialkowski court nonetheless heard the dispute.

That damages were at issue proved decisive, since only the judiciary, not an administrative official, is legally authorized to adjudicate damage claims rising out of asserted deprivations of constitutional rights. For this reason, a parent or guardian displeased with the level or quality of education a retarded child receives is thus theoretically able to bypass the administrative process, proceeding immediately to court, by converting what PARC envisioned as a matter to be settled within the educational system into a constitutional violation. Once the damages claim has been decided, the judge may also settle substantive claims about wrongful classification or the quality of treatment.

While going to court has its drawbacks, cost foremost among them, seeking judicial relief is nonetheless an attractive option for many parents of the handicapped, since their chances of winning are so much greater than in the administrative decision process. And even those families who seek administrative relief can, after Fialkowski, press their contention anew in federal court. If reliance on the courts

becomes widespread--or if, as seems more likely, major questions are brought to the judges--the administrative process would regularly be upstaged. This judicialization of special education cases may limit the administrative system's authority, with only routine cases of modest import settled in this fashion.

PARC did not foresee this development. But PARC contemplated the implementation of an effective administrative review-appeal system, and in the judgment of the Fialkowski court, that had not happened as of 1975. Although the PARC procedural safeguards prevented total exclusion from school, Fialkowski concluded, they did not prevent total exclusion from education. To define the appropriateness of an educational program in terms of state certification requirements, as the PARC regime essentially has done, ignored the content of the program in question. While that analysis oversimplifies (for administrative opinions in 1975 were both more complex and less coherent that Fialkowski acknowledges) it is the judicial perception which matters most. Fialkowski effectively pronounces PARC's effort to create a law-like system a failure. "The exhaustion of state remedies by these plaintiffs is likely to be futile," Fialkowski concludes, both because of defects in the quality of the system's determinations concerning appropriate treatment and because a key type of relief, money damages, can only be ordered by a judge.

The other major cases speaking to the claims of the handicapped focus on particular handicapped populations that assertedly fall under the PARC umbrella--the learning disabled and the gifted--or on the

quality of services that the state provides, more particularly, the availability of year-round instruction. Each decision has shaped the system in significant ways.

Frederick L. v. Thomas,[37] criticizes the hearing review process on even more fundamental grounds than Fialkowski. Whereas Fialkowski responds to a failure fully to implement a process of adversary hearings and review whose potential utility goes unquestioned, Frederick L. wonders whether the procedural approach itself might not be unsuited to the task at hand.

Frederick L. was a class action suit, brought on behalf of children with specific learning disabilities, to require that Pennsylvania provide them with an "appropriate" education. The state claimed that it had already made such a statutory commitment, rendering an injunction unnecessary. It also insisted that state-mandated due process hearings, identical to those provided in disputes concerning retardation, "will make the program for identifying learning disabled children fully effective."

The Frederick L. court was unpersuaded. The basic weakness of the state's approach, the court found, is that it depends on parents to initiate review, imposing an unfair burden on them: only parents who ascertain that a learning disability exists will take advantage of this due process protection, but learning disabilities may go unrecognized by parents. If there is an entitlement to treatment that responds to this particular and subtle learning impediment, the court concluded, parents

should not have to demonstrate its existence. Instead, the state must "institute a system to identify" learning-disabled youngsters.

The Frederick L. court held that, at least for the learning disabled, a determination of programmatic adequacy and accurate classification should not be premised on an adversarial hearing for at least one category of handicap. It is hard to imagine a harsher comment on the effectiveness of a procedural regime. Although Frederick L.'s conclusions are limited to the learning disabled, the court's basis for distinguishing the retarded--its assertion that retardation is more readily identified than learning disability--is unconvincing. If parental initiative is inadequate to trigger attention in the one instance, why is it not also inadequate in the other?

Halderman v. Pennhurst State School and Hospital[38] further undercuts the autonomy of the PARC administrative appeals process in disputes over appropriate education. Halderman focused on conditions in Pennhurst, the very institution that had prompted the initial PARC dispute. The district court opinion confronted issues of institutionalization broadly, treating education and training as part of a larger concern with "habilitation." It also was willing to entertain the claims of a class of individuals, all those residing at Pennhurst, and to order class relief. Although the district court determination that assignment to Pennhurst violates individuals' constitutional rights and the mandated closing of Pennhurst were eventually overturned, the propriety of class relief under fitting circumstances went unquestioned.

Thus, even after the Supreme Court's decision in Pennhurst[39], courts stand ready to provide that class justice not available through the bureaucratize PARC mechanism.

The implications of this authority to order class relief are evident in Armstrong v. Kline,[40] which expands the substance of the PARC entitlement well beyond what the administrative appeals system was willing to mandate. The court required school officials to provide handicapped children with a 365 day school year where needed to secure an appropriate education-- the children in question being those for whom an interruption in their education would cause, in view of their limited recoupment capacity, a regression in their development toward self-suffiency. The state's plea that the cost of such instruction would be exorbitant left the court unmoved. Although Pennsylvania has appealed the decision it provided in 1981 summer instruction to some 4,500 pupils at a cost of $1.5 million.

Tokarcik v. Forest Hills School District[41] intimates that the court may engage in routine oversight of the due process system in Pennsylvania. In Tokarcik, the court ordered the provision of clean intermittent cathetarization (CIC) for a child afflicted with spina bifida. The opinion defined CIC as a "related service" under applicable federal law, and hence something that a school district must provide free of charge to students who need it.

The particulars of Tokarcik matter less than the appellate court's view of its function as an "external check" on the due process system, guarding against possible procedural deficiencies or

institutional pressures inherent in the educational and administrative system. Indeed, the Tokarciks had unsuccessfully sought relief through the PARC system, losing both at the hearing and appellate levels. This conception of the role of the courts' continuing mission as supervisor expands on the PARC understanding of the judicial function. Under PARC, decisions about educational placement were to be made by lawyers and professionals, whose distinctive approaches would be brought to bear in the setting of a due process hearing. That a federal judge is willing to oversee hearing outcomes portends a judiciary inclined to intervene in the PARC system even when less than major change is sought. The provision of CIC to Amber Tokarcik is just the sort of garden-variety matter that PARC hoped to keep out of the courts.

The growing judicial involvement in supervising Pennsylvania's special education system is also apparent in the prolongation of the PARC litigation itself. Two motions for contempt and enforcement of PARC were filed in 1977 against Phildelphia, to compel that school district to implement the PARC mandate. In attempting to resolve the controversy, Federal Judge Edward Becker met informally with both sides between 1977 and 1981, settling questions ranging from the quality of the educational services provided to whether safety belts were provided to students riding on buses. Such matters were supposed to come within the province of the hearings and appeals system, not the courts.

Judge Becker presided over the signing of a new consent decree in June 1982, but that does not mark the end of the matter. On the very same day, the Philadelphia Education Law Center filed a petition in

federal court alleging that the city had violated state and federal law by placing learning disabled children on waiting lists for special classes. Apparently the courts will remain a permanent part of special education policymaking in Pennsylvania. PARC marked the beginning, not the end, of judicial involvement.

The cumulative impact of this judicial activity has been profound. Court opinions have influenced the nature and scope of PARC's coverage, giving direction to special education in Pennsylvania. The two categories of handicap accorded judicial recognition as entitled to "appropriate" education, the learning disabled and the gifted, have expanded more rapidly than any of the other categories. While the Pennsylvania's population of exceptional children grew only 35,000 (from 212,507 to 247,000) between 1975-6 and 1979-80, the number of learning disabled doubled, to 30,000, and the number of gifted tripled, to 60,000, during that period. Seemingly no special education policy or practice, whether routine or profound, is now immune from judicial review.

The reentry of the courts into the special education arena suggests that the judges recognize that the administrative hearing process, originally intended to substitute for judicial review, cannot adequately fulfill that function. PARC hearings are well-suited for deciding standard special education disputes, such as the provision of transportation and the review of requests for private school placement, which concern individual students (although even here, as Tokarcik reveals, the administrative apparatus may be slow to recognize new legal

obligations). Issues that require substantial structural change in educational practice--extending the school year for the seriously handicapped, for instance--or controversies concerning a large class of students--the adequacy of the education that Philadelphia provide to its learning disabled students, for example--lie beyond the capacity of the due process mechanism.

Under PARC, fidelity to law has become transformed into legalism, "rigid adherence to precedent and mechanical application of rules," without continuing attention to the purposes behind those rules. Hearings and appeals emphasize procedural and not educational matters; technicalities often carry the day. This legalism hampers "the capacity of the legal system to take into account new interests and circumstances, or to adapt to social reality."[42]

The emergence of a rigid and bureaucratically otiose regime has diminished the importance of the due process hearing as vehicle for achieving educational entitlements. Hearings settle familiar disputes and air minor complaints about education, but the major educational controversies still wind up in the legislature or the courts. The increasing tendency to initiate judicial action reflects disenchantment with the due process hearing as a vehicle for achieving educational entitlements for the handicapped. It requires lowering initial expectations about the change that could result from incorporating legal forms within the bureaucracy.

The increase in enrollment and resources devoted to special programs after PARC reveals something more: even without due process

hearings, rough justice can be secured once, the educational system has learned how to discharge its responsibilities to the handicapped and public officials prove their willingness to support the needed programs. Administrative oversight, of the sort presently functioning in Pennsylvania and elsewhere, may accomplish at least as much as due process.

Such a system will work only if the resources for expansion are available, as they were in Pennsylvania during the decade after PARC. Yet in a time of fiscal cutbacks, such support has become much more difficult to sustain. Federal support for handicapped education declined by more than one-fifth between 1981-82 and 1982-83. The stirrings of dissatisfaction with the high cost of special education have already been heard in Pennsylvania, as a number of legislators have threatened to trim the state's special education budget. Said one special education official: "We used to decide what the programs were, then we told people of the cost. Now they [the legislators] say: 'Here's the money, shape a program...If you have four psychologists, why not three?'"[43] An attempt to reduce aid to private schools, which serve handicapped children is also afoot in Pennsylvania. Cuts in state support will be made, yet the right to an appropriate education is supposed to be guaranteed to all exceptional children. Those questions will not be settled within the PARC framework.

VII. Conclusion: Due Process and Substantive Justice

If hearings cannot assure good outcomes with adequate funding and cannot compensate for fund reductions, should they no longer be required? Has the appeal of due process been overtaken by events? Pennsylvania's experience with the due process hearings, on which the requirements of the Education for All Handicapped Children Act were modelled, puts this question in useful perspective. Due process has been useful for settling individual grievances, serving as a forum where a limited class of personal rights could be recognized. That is less than its advocates hope or its opponents feared.

More generally, the PARC settlement placed the education of the handicapped on Pennsylvania's political agenda, as so often happens when courts intervenes in the policy process. Public officials are now more likely to consider and act upon the demands of handicapped children and their parents. They have largely adopted as their own the values enshrined in the PARC consent decree: that the handicapped ought to receive an education, that consistent and accurate diagnoses be made, that placements be as fitting as resource constraints permit and as close to the regular classroom as possible. The state department of education, committed to these values, assiduously monitors special education programs. In almost all instances, the quality of programs offered by school districts is attributable less to parental resort to the due process forum than to state prodding or voluntary reform spearheaded by local professionals.

This conclusion casts doubt on the continued utility of the due process hearing in special education. Though due process hearings initially spurred the educational system into responsiveness, they seem neither necessary nor sufficient to meet the continuing concerns of those attentive to the interests of the handicapped. Yet the allure of due process remains strong. In symbolic terms, the triumph of procedure represented a great victory for those concerned about the plight of the handicapped, a testimony to the seriousness of the fairness-based claims of the handicapped. Moreover, the hearing offers a kind of insurance; it is a device that is available to unhappy parents, should Pennsylvania renege on its commitments to the handicapped. And the threat of recourse to a hearing may induce responsiveness that is hard to measure but nonetheless important.

The decade-long history of implementing the PARC decree argues for a lowering of aspirations concerning the impact of legalization. Due process will not "revolutionize" education. New legal regimes and the rationalization of official behavior they promise are harder to introduce into the professional and bureaucratic culture than seemed true in an era of "due process romanticism;"[44] and once introduced, they are less well suited to the task of ensuring entitlements than was imagined. The great danger of a fixation on process is the trivialization of substantive rights, as the mere fact of a hearing diverts attention from the more difficult--and far more vital--task of offering an education that handicapped children need and that society can afford.

FOOTNOTES

1 343 F.Supp. 279 (E.D. Pa. 1972).

2 See, R. Dworkin, Taking Rights Seriously (1977).

3 D. Kirp, "Schools as Sorters", 21 Penna. L. Rev. 705 (1973).

4 See generally, D. Horowitz, The Courts and Social Policy,(1976); A. Chayes, "The Role of the Courts in Public Law Litigation", 89 Harv. L. Rev. 1281 (1976); N. Glazer, "Toward an Imperial Judiciary?", 41 The Public Interest 104 (1975).

5 D. Kirp, "Professionalization as Policy Choice: British Special Education in Comparative Perspective", 34 World Politics 137 (1982).

6 J. Pittenger and P. Kuriloff, "Reforming a Radical Law", 66 The Public Interest 72-73 (1982).

7 D. Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting", 28 Stan. L. Rev. 841 (1976).

8 L. Lippman and I. Goldberg, Right to Education: An Anatomy of the Pennsylvania Case and its Implications for Children 20 (1973). See also, D. Kirp, W. Buss, P. Kuriloff, "Legal Reform, of Special Education: Empirical Studies and Procedural Proposals", 62 Calif. L. Rev. 40, 78 (1974).

9 Board of Education v. Rowley, 102 S.Ct. 1481 (1982).

10 20 U.S.C. Sec. 1401. et seq.

11 This agenda setting consequence of the suit has been attested to by several lawyers and special educators involved in the PARC litigation.

12 P. Kuriloff, "Due Process for Individual Justice" 170 (unpublished manuscript 1977).

13 Id at 174-75.

14 Id at 206.

15 D. Kirp, "Are Lawyers the Heroes of the Children's Movement?", essay review of Stapleton and Teitelbaum, In Defense of Truth, 52 Texas L. Rev. 816 (1974).

16 R. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: the Case of Divorce", Yale L. J. 950 (1979).

17 (Appeal 2, 1973).

18 (Appeal 6,1973).

19 Stephen and James (Appeal 18, 1974).

20 (Appeal 9, 1974).

21 (Appeal 15, 1974).

22 (Appeal 22, 1974).

23 (Appeal 24, 1975).

24 D.Thornburgh, Governor's Executive Budget, Commonwealth of Pennsylvania 1982-83, 235.

25 John Doe (Appeal 1, 1973).

26 D. Kirp and G. Babcock, "Judge and Company: Court Appointed Masters, School Desegregation and Institutional Reform", 32 Ala. L.Rev. 313 (1981).

27 See, inter alia appeals 82, 83, 84, 85, 86, 98, 99, 101, 102, 103.

28 See, inter alia, appeals 99,104,122.

29 E.g., James (Appeal 75, 1977).

30 See, inter alia, appeals 61,71,72,81,91, 137.

31 (Appeal 8, 1973).

32 (Appeal 82, 1978).

33 Interview, John Alzamora, Harrisburg, Pa., July 1, 1981.

34 These factors usually are implicit considerations of the state department of education when the appeals are reviewed.

35 Correspondence, John C. Pittenger to David L. Kirp, October 4, 1977.

36 405 F. Supp. 946 (1975).

37 408 F. Supp. 832 (E.D. Pa. 1976), 415 F. Supp. 960 (E.D. Pa. 1976), rev'd 578 F.2d. 513 (3rd Cir. 1978).

38 446 F. Supp. 1295 (E.D. Pa 1977), aff'd in part, 612 F.2d.84 (3rd Cir. 1979), rev'd, 451 US 1, 101 S.Ct.1531 (1981), aff'd in part, rev'd in part, 673 F.2d. 647 (1982).

39 cert. denied 102 S.Ct.82 (1981).

40 476 F. Supp 583 (E.D. Pa. 1979); aff'd sub nomine Battle v. Commonwealth Slip Opinion (3rd. Cir. 7/15/80).

41 (W.D. Pa. C.A. #79-338).

42 P. Selznick, Law, Society, and Industrial Justice 13 (1968).

43 Interview, William Ohrtman, Harrisburg, July 7, 1982.

44 Interview, Thomas Gilhool, Philadelphia, July 9, 1981.

Bibliography

Chayes, Abram, "The Role of the Judge in Public Law Litigation," Harvard Law Review, 86 (1976).

Dworkin, Ronald, Taking Rights Seriously, Cambridge, Harvard University Press, (1977).

Glazer, Nathan, "Toward an Imperial Judiciary," The Public Interest, 41, (1975).

Kirp, David, "Are Lawyers the Heroes of the Children's Movement" essay review of Stapleton and Teitelbaum, In Defense of Truth, Texas Law Review, 32, (1981).

_____. "Proceduralism and Bureaucracy: Due Process in the School Setting," Stanford Law Review, 28 (May 1976).

_____. "Professionalization as Policy Choice: British Special Education in Comparative Perspective," World Politics, 34 (1982).

_____. "Schools as Sorters," Pennsylvania Law Review, 21 (1973).

with Babcok, Gary, "Judge and Company: Court Appointed Masters, School Desegregation and Institutional Reform," Alabama Law Review, 32, (Winter 1981).

with Buss, William and Kuriloff, Peter, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," California Law Review, 62 (January 1974).

Kuriloff, Peter, "Due Process For Individual Justice" (Unpublished Manuscript 1977).

Mnookin, Robert and Kornhauser, Lewis, "Bargaining in the Shadow of the Law: The Case of Divorce," Yale Law Journal, 88 (1979).

Pittenger, John C. and Kuriloff, Peter, "Reforming a Radical Law," The Public Interest, 66 (Winter 1982).